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IN THE

Supreme Court of the United States

October Term, 1969

No. 234

HENRY J. CZOSEK, *et al.*,
Petitioners,

v.

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD, WALTER DALY and ERIE LACKAWANNA RAILROAD COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS, O'MARA, McCORMICK, PACKARD AND DALY

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BATAVIA TIMES, LAW PRINTERS,
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Opinions Below

The opinion of the Court of Appeals (A. 21-29) is reported at 407 F. (2d) 674. The decision and order of the District Court (A. 17-20) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered February 24, 1969 (A. 30-31). Rehearing was denied by the Court of Appeals March 18, 1969 (A. 32). The petition for a Writ of Certiorari was filed June 13, 1969 and was

granted October 13, 1969. The jurisdiction of this Court rests on Title 28, United States Code, Section 1245 (1).

Statutes Involved

The statutory provisions principally involved are Section 3 First (i) and (j) of the Railroad Labor Act (45 U. S. C., Section 153 First (i) and (j):

"SECTION 3 FIRST

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person by counsel or by other representatives as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

Federal Rules of Civil Procedure

Rule 8

(a) Claims for relief.

A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim or third party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdic-

tion to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(f) Construction of Pleadings.

All pleadings shall be so construed as to do substantial justice.

Questions Presented

(1) May an action for damages brought by railroad employees against their employer for alleged wrongful discharge and against their union and its representatives for failure to process their claims against the railroad, be dismissed as to the railroad on the ground of exclusive jurisdiction in the National Railroad Adjustment Board, but continue to be maintained as a "fair representation" case against the union in recovery sought solely from it, where the damages claimed stem from the alleged wrongful discharge by the employer in breach of the collective bargaining agreement, independent of any conduct by the union?

(2) May railroad employees maintain an action against their union for failure to process their grievances without exhausting their administrative remedies, when there is now showing that it would have been futile for them to do so, and no claim is made they could not personally press their rights under the collective bargaining agreement and before the National Railroad Adjustment Board?

(3) Is a proper claim for violation of the union's duty of fair representation stated by a complaint which fails to allege any facts which would constitute hostile discrimination by the union, or furnish any basis from which such hostile discrimination could reasonably be inferred?

Statement of the Case

This case is before the Court to review the judgment of the Second Circuit Court of Appeals (A. 30-31) reversing the decision and order of the District Court (A. 17-20) as to the union and further allowing the plaintiffs to amend their complaint against the railroad, to allege that the railroad acted with a motive to discriminate, or acted with knowledge that the union was discriminating against the plaintiffs.

The plaintiffs (named as respondents herein) O'Mara, McCormick, Packard and Daly, are former members of Local 826, System Federation No. 78 and Council No. 2 of the International Brotherhood of Firemen and Oilers. They were originally employed by the Delaware, Lackawanna & Western Railroad as stationary engineers, with their railroad service ranging from forty-nine years to ten years.

In September, 1960, the Interstate Commerce Commission authorized the merger of the Delaware, Lackawanna & Western Railroad with the Erie Railroad.

In June of 1962, these employees were furloughed by the railroad and their positions as stationary engineers were filled by four men formerly holding a laborers' classification with the Erie Railroad.

Those four replacements were all former employees of the Erie Railroad and while belonging to the same parent union, were members of a different local, system and federation.

At a trial of the issues, the plaintiffs are prepared to show that after the merger of the two railroads, the union composed by men from the former Erie Railroad emerged

politically stronger than that of the former Delaware, Lackawanna & Western Railroad and in this case, they in fact discriminated against plaintiffs in allowing their fellow union members to fill the positions of stationary engineers.

Upon not being recalled by the railroad, the furloughed employees contacted the Master Mechanic, one C. E. Maahs and he advised that they were furloughed because of the closing of the Michigan Avenue Power Plant, and that this occurred because of the obsolescence of the facility and their furlough was not a result of the merger.

Thereafter, W. G. Carlson, Chief Mechanical Officer of the Erie Lackawanna Railroad was contacted and it was his decision in letter form to plaintiff's counsel that the employees were not considered as effected employees under the terms of the implementing agreement between the Erie Lackawanna Railroad Company and System Federation No. 78 and System Federation No. 100. The effect of this position was that there was no severance pay due to the furloughed employees.

Fred R. McKernan, General Chairman and Secretary-Treasurer of System Council No. 2, International Brotherhood of Firemen and Oilers, was contacted and he concurred in the stand that the railroad took in this matter and further advised the employees that any further requests by them should be directed to the railroad and not to the union.

Anthony E. Metz, president of the union wrote the plaintiff's counsel indicating that McKerman gave proper information and that the railroad was the proper party to contact relative to any further information.

None of these plaintiffs were ever recalled by the railroad and they have not been employed by the railroad since June, 1962.

A complaint was filed in the District Court joining as defendants certain union officers and the railroad.

A motion to dismiss the complaint was granted by the District Court, finding no basis for Federal jurisdiction.

In its opinion, the Court of Appeals (A. 21-29) held that the complaint was sufficient to state a federal claim against the union for breach of its duty of fair representation and that on remand, the plaintiffs should be granted leave to amend their complaint to state a cause of action against the railroad company.

Summary of Argument

1. The complaint as presently constituted states a claim against the union for breach of its duty of fair representation. A long recitation of the facts was not alleged in the complaint, because it was the opinion of counsel that the Federal Rules of Civil Procedure do not require that facts be pleaded to assert a valid claim. Further, this Court's approach to the criteria with respect to the sufficiency of a complaint as expressed in *Conley v. Gibson,* 355 U. S. 41, is one which is surely applicable.

If the facts of the instant case do not constitute a Federal claim, this can be determined after discovery proceedings, but to allow a dismissal of the complaint against these former employees, bearing in mind what they intend to prove relative to the conduct of its union representatives and the railroad would be highly unequitable.

It is interesting to note that none of the named defendants assert that they are unaware of what the plaintiffs' claims were, nor do they claim surprise.

2. It is further submitted that the permission by the Court of Appeals to amend the complaint against the rail-

road was an exercise of discretion and not unfair and that if the Court sustains the judgment of the Court of Appeals, it is the intention of the plaintiffs to amend said complaint.

3. If the Court does not feel that the complaint as presently constituted is sufficient, then the plaintiffs should be allowed to amend said complaint.

ARGUMENT

I. The complaint states a claim against the petitioners within the Federal Rules of Civil Procedure.

Conley v. Gibson, 355 U. S. 41 (1957) was a case similar to the present matter in that the sufficiency of the complaint was attacked.

In that case, the railroad abolished forty-five jobs held by negroes who were either discharged or demoted as a result of the job abolishment. Their jobs were filled mostly by white employees and by some negroes with a loss of seniority. An action was commenced and this Court stated at 355 U. S. 44:

> "This case involves no dispute between employees and employer, but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated by it in bargaining. The Adjustment Board has no power under Section 3 First (i) or any other provision of the Act to protect them from such discrimination."

At 355 U. S. 45, the Court continues:

> "In appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can

prove no set of facts in support of his claim which would entitle him to relief."

At 355 U. S. 47 the Court stated:

> "The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that is its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is, and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrates this. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8 (f) that 'all pleadings shall be construed as to do substantial justice', we have no doubt that the petitioner complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

While the present matter does not present a racial discrimination question as did *Conley*, the plaintiffs feel that there is a political discrimination question involved.

To have the plaintiffs deprived of the opportunity to litigate the issues because of technical objections is to penalize them harshly.

This Court's approach to the sufficiency of a complaint in *Conley v. Gibson*, 355 U. S. 41 was an equitable and common sense method which was utilized by the Court of Appeals.

Petitioners' reliance on *Vaca v. Sipes,* 386 U. S. 177 in Part I(a) of their Argument as found on page 9 of their brief appears to be misplaced.

According to the standard they would have this Court impose, the plaintiff in a case such as this would have to plead not only his claim, not only all the facts but rather the entire case.

That this position is manifestly contrary to both the letter and the spirit of the Federal Rules of Civil Procedure is evident.

II. It is not necessary that the respondent-employees allege in their complaint that they have exhausted all administrative remedies.

Vaca v. Sipes, 386 U. S. 171 (1967) which is relied on by the petitioners, equally supports the petition of the plaintiffs.

That case involved a class action against the union and its officers based upon wrongful discharge in violation of the collective bargaining agreement. The employee in that matter was fired on grounds of poor health. The union in that case however, unlike the present one, did act. They sent the employee to their own physician and did follow through certain steps of the grievance procedure. The union physician agreed with the company that the employee was not in good health and thereafter, the union decided not to arbitrate.

In this case, the union refused to do anything on behalf of the plaintiffs, union members, and it is submitted, that the motive from which they acted was one of discrimination. In *Vaca v. Sipes,* 386 U. S. 171, 180 the Court stated:

"A primary justification for the preemption doctrine —the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for the purpose—is not applicable to cases involving alleged breach of the union's duty of fair representation."

At 386 U. S. 185, the Court continued:

"It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractural remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge and breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff benefit were it not for the union's breach of a statutory duty of fair representation to the employee. To leave the employee remediless in such circumstances, would, in our opinion be a great injustice. We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon union such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such arguments.

For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense upon the failure to exhaust contractural remedies, provided the employee can prove the union as bargaining agent breached his duty of fair representation in its handling of the employees grievance."

In *Glover v. St. Louis-San Francisco Railroad Company*, 89 Supreme Court 548, this Court reviewed a situation in which eight negroes and five white employees sued a railroad and a union in a complaint alleging that the failure

to promote was due to a tacit understanding between the railroad and the union.

The Court indicated at page 550:

"We have held that Section Three First (i) by its own terms applies only to disputes between an employee or group of employees and a carrier or carriers.

The Court has made clear however, that the exhaustion requirement is subject to a number of exceptions for the variety of situations in which doctrinaire application of the exhaustion rule would defeat the coverall purposes of Federal Labor Relations policy."

"In a line of cases beginning with *Steele v. Louisville & Nashville Railway Co.*, the Court has rejected the contention that employees alleging racial discrimination should be required to submit their controversy to 'a group which is in large part chosen by the defendant against whom their real complaint is made', 323 U. S. at 206.

"The reasons which prompted the Court to hold as it did, about the inadequacy of a remedy before the adjustment board apply with equal force to any remedy administrated by the union, by the company, or both, to pass on claims by the very employees whose rights they have been charged with neglecting and betraying."

In a situation where aggrieved employees have as the basis of their complaint political discrimination, rather than racial discrimination, the reasons for not requiring exhaustion of administrative remedies are equally applicable.

Where both defendants have benefited by the furloughing of these plaintiffs, it seems ludicrous to require exhaustion.

The inference by the petitioners that the Court of Appeals ignored *Vaca v. Sipes*, 386 U. S. 171, is not support-

ed by the record because it was cited by plaintiffs' counsel in his brief and discussed by the Court and counsel in oral argument.

III. The Court of Appeals did not commit error in allowing the respondent-employees to amend their complaint against the railroad.

In *Richardson v. Texas & New Orleans Railway Co.*, 242 F. (2d) 230, the Fifth Circuit held that the Federal Courts may grant railway employees ancillary relief against the employer who aids and abets their union in breaching its duty of fair representation, and that the bargaining union has implied statutory obligations to bargain impartially for all and further that the railroad could be required to respond in damages to an injured railroad employee for breach of its own duty not to join in causing or perpetuating a violation of the railway labor act and the policy which it is supposed to effectuate. The Court stated at page 236:

> "It takes two parties to reach an agreement and both have a legal obligation not to make or enforce an agreement or discriminatory employment practice which they know or should know is unlawful. Unless financial responsibility for a joint breach of such duty is required from both sides of the bargaining table, the statutory policy implied under Steele will be impracticable of enforcement. For the foregoing reasons, we think that the Bortherhood's obligations under the statutes does not exist *in vacuo*, unsupported by any commensurate duty on the part of the carrier.
>
> "The railroad may not have been the Brotherhood's keeper for bargaining purposes, but we think that under the allegations of this complaint, it can be required to respondent damages for breach of its own duty not to join in causing or perpetuating a violation of the Act and that policy which it is supposed to effectuate."

In order to give the plaintiffs complete relief against all the parties they allege were involved in their job loss, it is only logical that the railroad should remain as a defendant.

This position is best exemplified by the words of Judge Medina in *Cunningham v. Erie Railroad*, 266 F. (2d) 411, 416 (Second Circuit):

> "It would be absurd to require this closely integrated dispute to be cut up into segments."

Conclusion

For the reasons heretofore referred to, it is requested that the judgment of the Court of Appeals be affirmed and that the plaintiffs be allowed to amend their complaint against the railroad. At the least, the plaintiffs should be granted leave to amend their complaint against both the union defendants and the railroad and said complaint should not be dismissed.

Respectfully submitted,

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RESPONDENT'S

BRIEF

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, ERIE LACKAWANNA RAILROAD COMPANY

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BRIEF FOR RESPONDENT, ERIE LACKAWANNA RAILROAD COMPANY

Questions Presented

1. Should the Supreme Court reverse the Court of Appeals for the Second Circuit and direct that the District Court's order dismissing complaint against all defendants be reinstated on the ground that plaintiffs' only claim is within the exclusive jurisdiction of the National Railroad Adjustment Board and plaintiffs' complaint fails to allege any other claim as against any defendant which the District Court may consider?

2. Alternatively, is there anything in this case requiring the Supreme Court to establish a further exception permit-

ting an employee to sue his Union and employer in the District Court beyond those explicitly mentioned in *Vaca v. Sipes*, 386 U. S. 171 (1967), and *Glover v. St. Louis-San Francisco Railway Co.*, 393 U. S. 324 (1969)?

Statement of the Case

The petitioners' brief (pp. 4-7) contains a concise statement of the case to date. With respect to the plaintiffs' claim against the defendant Railroad, the District Court said:

> Inasmuch as diversity of citizenship clearly is lacking as among the parties, jurisdiction may not be predicated upon that ground. *Treinies v. Sunshine Mining Co.*, 308 U. S. 65, 71 [*sic*] (1939), *American Fire & Cas. Co., vs. Finn*, 341 U. S. 617 [*sic*] (1951). The plaintiffs argue, however, that the action may be sustained either as a suit for wrongful discharge or as a suit based upon hostile discrimination.
>
> Assuming, without deciding, that the complaint may be viewed as a discharge grievance subject to arbitration under the Railway Labor Act (45 U. S. C. §§ 151 *et seq.*), the action would be governed by the principles set forth in *Moore v. Illinois Central Railroad Co.*, 312 U. S. 630 (1941) and *Transcontinental & Western Air, Inc. v. Koppal*, 345 U. S. 653 (1953). *Walker v. Southern Ry. Co.*, 385 U. S. 196 (1966). These decisions permit an aggrieved railroad employee to elect to treat his discharge as final without exhausting his administrative remedies when, and only when, diversity jurisdiction exists and such exhaustion is not required under applicable state law. See *Larson v. American Air Lines, Inc.*, 313 F. 2d 599, 602 (2d Cir. 1963); *Walters v. Chicago & Northwestern Ry. Co.*, [*sic*] 216 F. 2d 332, 335-336 (7th Cir. 1954). Here, not only is diversity jurisdiction lacking, but it also seems clear that the New York courts would require exhaustion. See *Pacilio v. Pennsylvania R.R. Co.*, 381 F. 2d 570 (2d Cir. 1967). The complaint does not allege, and

> in opposition to this motion the plaintiffs have not claimed that they have exhausted their administrative remedies. (A. 19-20.)

Although on appeal the Court (A. 28) granted plaintiffs leave to amend their complaint against the Railroad "if they can" allege that it participated in the alleged discrimination by the Union, it basically agreed with the District Court's dismissal (A. 29):

> But dismissal of the employer from this suit will be proper if it appears that its action furloughing the plaintiffs, and the Union's discriminatory refusal to process grievances concerning these furloughs, were not part of a combined attempt to discriminate. In that event plaintiffs' complaint against the Railroad would concern a violation of their rights under the collective bargaining agreement and this, as discussed above, *falls within the exclusive primary jurisdiction of the Adjustment Board.* (Emphasis supplied.)

Summary of Argument

1. There is no jurisdiction in the District Court to entertain plaintiffs' claims against the respondent railroad. The allegations of the complaint, viewed in the most favorable light to plaintiffs, show at best a claim falling within the exclusive primary jurisdiction of the National Railroad Adjustment Board. The District Court properly dismissed the complaint. This should be reinstated. The Second Circuit upheld the District Court on this point but permitted plaintiffs to amend their complaint against the railroad "if they can". Such a gratuitous direction was unnecessary. Accordingly, the District Court's decision should be reinstated.

2. Should plaintiffs be permitted to continue this action—both petitioners—unions and respondent railroad have demonstrated that plaintiffs should not be permitted—

there is no basis for respondent railroad to be a party defendant. There is no claim of hostile discrimination by the Erie Lackawanna. The question whether plaintiffs' being furloughed violated a merger implementing agreement is exclusively one for the National Railroad Adjustment Board, not for the District Court. That part of petitioners' Argument II (pet. brief pp. 17-22) implying that *Vaca v. Sipes*, 386 U. S. 171 (1967), holds plaintiffs' employer-railroad should also be a party if the suit is to continue against the Union is not in accordance with the Court's opinion.

Vaca v. Sipes, supra, involved a case under the L. M. R. A., 29 U. S. C. § 141 *et seq.*, where the Union exclusively controlled the full administrative process which finally determined the employee's claim. It did not involve railroad employment or the National Railroad Adjustment Board. Two cases decided after *Vaca*, *Glover v. St. Louis-San Francisco Railway Co.*, 393 U. S. 324 (1969), and *Slagley v. Illinois Central Railroad Company*, 397 F. 2d 546 (7th Cir. 1968), support respondent Erie Lackawanna's position that it should be dismissed from this action which is allegedly based upon an implementing agreement. Plaintiffs must bring their claim before this specially designed and skilled Railroad Board. They have shown no reason why they didn't or couldn't bring their case to the Board. There is no justification for this case to be in the District Court nor is there any jurisdiction in the District Court.

ARGUMENT

I. The District Court was correct in dismissing plaintiffs' complaint because of the failure to exhaust their administrative remedies and to bring their disputes before the National Railroad Adjustment Board.

The *Railway Labor Act*, 45 U. S. C. Section 151 *et seq.*, sets forth a precise procedure for the handling of so-called minor disputes between railroad employees and their employers.

One of the leading cases interpreting this aspect of the *Railway Labor Act* is *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U. S. 30 (1957). This case involved a strike by a Union after negotiations failed under a collective bargaining agreement. The District Court entered a permanent injunction against the strike upon the ground that the provisions of the *Railway Labor Act* creating a National Adjustment Board shows that they were intended to provide for the determination of minor disputes.

In that case the Union argued that the language "The disputes may be referred by petition of the parties or by either party to the . . . board" meant only that an Adjustment Board has been organized and the parties are free to make use of the procedures if they so desire but there is no compulsion on either side to allow the Board to settle a dispute. The Supreme Court disagreed with this interpretation and held that the Act established a procedure comparable to compulsory arbitration (353 U. S. at p. 34).

The dispute in the present case is a so-called "minor dispute" under the *Railway Labor Act*. The Supreme Court

in the *Chicago River* opinion explained the difference between minor and major disputes:

> The grievances for which redress is sought by the Brotherhood are admittedly "minor disputes" as that phrase is known in the parlance of the Railway Labor Act. These are controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee, § 2, Sixth. They may be contrasted with "major disputes" which result when there is disagreement in the bargaining process for a new contract. § 2, Seventh. See Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 722-724. (353 U. S. at p. 33.)

Plaintiffs' complaint alleges that they were furloughed following a merger and that such was in contravention of an implementing agreement relative to the merger (A. 6). If any dispute exists, such is of a minor nature within the meaning of the *Railway Labor Act* and plaintiffs must exhaust the remedies under any applicable agreement. If that does not result in a satisfactory disposition, the matter must be referred to the National Railroad Adjustment Board. There would be federal jurisdiction only after the Adjustment Board has made an award in plaintiffs' favor with which the Erie Lackawanna Railroad refuses to comply. *Republic Steel Corp. v. Maddox*, 379 U. S. 650 (1965); *Pacilio v. Pennsylvania Railroad Company*, 381 F. 2d 570 (2 Cir. 1967). There has been no such award and plaintiffs have not pursued the proper channels for the determination of the alleged dispute.

We do not discuss whether plaintiffs' claims are actually for wrongful discharge. But even if we assume *arguendo* that a wrongful discharge was involved, plaintiffs' claim must fail for the reason that state law is controlling in such cases and unless there is diversity of citizenship, which is lacking here, the Federal Courts have no jurisdiction.

Plaintiffs have relied on the case of *Walker v. Southern Railway Co.*, 385 U. S. 196 (1966) for the proposition that under federal substantive law, plaintiffs may elect to pursue either their administrative remedy or institute an appropriate Court action for money damages based on wrongful discharge. *Walker* was decided on the basis of applicable state law, and if federal substantive law were to apply, the doctrine of exhaustion of administrative remedies as enunciated in *Republic Steel Corp. v. Maddox*, 379 U. S. 650 (1965), would be controlling. *Pacilio v. Pennsylvania Railroad Company*, 381 F. 2d 570 (2d Cir. 1967).

The doctrine of applicability of state law is clearly enunciated in *Transcontinental and Western Air, Inc. v. Koppal*, 345 U. S. 635 (1953), where the Court said:

> Such employee may proceed either in accordance with the administrative procedures prescribed in his employment contract or he may resort to his action at law for alleged unlawful discharge if the *state courts recognize such a claim.* (Emphasis supplied.) Where the applicable law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover . . .
>
> On the other hand, if the applicable local law, as in Missouri requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, *he must show that he has done so.* (Emphasis supplied.) Here respondent was employed by the carrier, subject to Title II of the Railway Labor Act, and his employment contract contained many administrative steps for his relief, all of which were consistent with the Act. Accordingly, while he was free to resort to the Courts for relief, he was there required by the law of Missouri to show that he had exhausted the very administrative procedure contemplated by the Railway Labor Act. In the instant case, he was not able to do so and his complaint was properly dismissed. (345 U. S. 661-662.)

Walker does not depart from this doctrine, for as the District Court noted, state law was controlling. Specifically, in that case the governing state law required exhaustion of administrative remedies where an employee seeks reinstatement and back pay; however, if that party chooses to accept his discharge as final and makes claim to money damages only, he does not have to allege exhaustion of remedies. *Walker v. Southern Railway Co.*, 237 F. Supp. 278.

It appears well settled in New York State that exhaustion of remedies is a condition precedent to a wrongful discharge action under a collective bargaining agreement. *Pacilio v. Pennsylvania Railroad Company, supra; Larsen v. American Airlines, Inc.*, 313 F. 2d 599 (2d Cir. 1963). Thus, it can be seen that plaintiffs are faced with the requirement of exhausting their administrative remedies under both federal substantive law and New York State Law.

However, plaintiffs have attempted to excuse their failure to comply with federal substantive law, state law and the terms of the collective bargaining agreement by asserting alternatively that they were powerless to individually prosecute their claims under the agreement or that they in fact did exhaust all available administrative remedies. Either position is unsupportable under the facts and law of this case.

"Unlike the situation in *Vaca v. Sipes, supra,* discussed at length in petitioners' brief, which involved a dispute arising under the provisions of the *Labor Management Relations Act,* as amended, Congress has preserved the right of an aggrieved employee covered by the *Railway Labor Act* to participate individually in each step of the grievance

procedure. These rights cannot be nullified merely by agreement between a carrier and a Union. *Elgin, J. & E. R. Co. v. Burley,* 325 U. S. 711, n. 39 p. 740 (1945). The specific right of an individual to pursue his remedies independent from his Union can be found in 45 U. S. C. Section 153 First (j) which reads as follows:

> (j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

Title 45 U. S. C. Section 152 Fourth contains a proviso which again indicates the right of an individual to carry individually his grievance to his employer. This proviso reads as follows:

> . . . [P]rovided, that nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

There is no allegation that plaintiffs have submitted this dispute to the appropriate division of the Adjustment Board. An employee cannot invoke the remedial provisions of the *Railway Labor Act* in the first instance and then abandon that process and resort to the Courts by claiming that he has exhausted all his administrative remedies.

II. Even if the action should be permitted to continue against petitioners' union, the respondent employer-railroad should not be a party.

Respondent agrees with petitioners' basic contention that the District Court was correct in dismissing the complaint as to all the defendants, and joins with petitioners in urging the Court to reinstate the District Court's original order of dismissal. However, respondent cannot agree that it is a necessary party to an action by a group of employees against their union for an alleged breach of the union's duty of fair representation.

Plaintiffs' counsel in his affidavit opposing the motions to dismiss brought by a union and the employer in District Court characterized the complaint as alleging three causes of action—two against the railroad employer and one against their union (A. 15). The Court of Appeals construed both causes of action against the railroad as disputes arising out of an employer-employee contract of a type for which primary jurisdiction has been vested in the Railroad Adjustment Board and not in the Courts (A. 26). It should be noted as to that portion of the complaint which alleged violation of the *Interstate Commerce Act*, 49 U. S. C. § 5 *et seq.*, the Court of Appeals additionally upheld the District Court's dismissal on the basis that it did not give defendants "fair notice" of the basis of plaintiffs' claim under the Act (A. 26). As against the union, the Court of Appeals found the complaint barely sufficient to state a cause of action against it.

In this Court, petitioner-union alternatively implies that a railroad employer is a necessary party to an action by a group of employees against their union based upon a claim of the union's duty to fairly represent them. The thrust of petitioner's argument appears to be grounded on a fear

that it will be exposed to liabilty for damages attributable solely to the employer's unrelated conduct. However, the Court of Appeals made no determination as to the measure of damages to be recovered in this action nor did it suggest that petitioner would be required to assume the burden of damages attributable to the acts of the employer. In fact, inasmuch as the employer's conduct preceded the union's action, damages arising from any wrongful discharge by the employer would not and could not be assessed against the union. *Vaca v. Sipes*, 386 U. S. 171.

In its present state, this action is one for redress against a bargaining unit by members for conduct not related to the railroad's acts. An adjudication of the propriety of the union's conduct does not necessarily require an inquiry into the employer's acts. Indeed, it may well be found that the employer acted correctly but the union did not. Absent an allegation or showing that the union and the employer combined in a scheme to discriminate against the employees the employer's rights and interests will not be affected by the action against the union. *Conley v. Gibson*, 355 U. S. 41.

Petitioner, in implying that the employer is a necessary party to an action against a union under these circumstances, is in effect asking the Court to lay down a rule of law which would frustrate the intent of Congress as enunciated in the *Railway Labor Act*. Such a rule would allow an employee to circumvent the duty to pursue administrative remedies prescribed by Congress in each and every situation where his union refuses to act on his behalf, even though such an employee has the statutory right to individually present his own grievance before the Railroad Adjustment Board. 45 U. S. C. § 153 First (j). Although petitioner argues that *Vaca v. Spes, supra*, man-

dates this conclusion, it becomes apparent from a reading of the Court's opinion in *Glover v. St. Louis-San Francisco Railway Co.*, 393 U. S. 324 (1969), that *Vaca* did not abrogate the exhaustion of remedies doctrine as set forth in *Republic Steel Corp. v. Maddox*, 379 U. S. 650, and *Walker v. Southern Railway Co.*, 385 U. S. 196.

Vaca did not change the basic rule of exclusive administrative determination. What it did hold, in an L. M. R. A. case where the Union had the sole power to invoke the administrative procedure, is that there are certain situations where the employee may sue in the District Court; otherwise he may be remediless. Thus in *Vaca* the Court stressed:

> "[I]t is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established in the bargaining agreement. Republic Steel Corp. v. Maddox, 379 U. S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580. However, because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures." 386 U. S., at 185.

Vaca treated two situations in which suit could be brought by the employee: (1) where the employer's course of conduct amounted to a repudiation of the bargaining contract, and (2) where the union has the sole power to invoke the administrative procedures "*and* the employee-plaintiff has been prevented from exhausting his administrative remedies by the union's *wrongful* refusal to process the grievance", 386 U. S. 171, 185 (emphasis by Court). Neither applies in our case.

In *Glover v. St. Louis-San Francisco Railway Co.*, 393 U. S. 324 (1969), the Court established a third set of circumstances excusing the employee from pursuing the mandated administrative procedure, namely, "where the effort to proceed formally with contractual or administrative remedies would be wholly futile". *Glover* involved a claim of discrimination against the railroad and Brotherhood on the basis of race. In an amendment to their complaint plaintiffs demonstrated the futility of attempting to invoke the administrative procedure or to take the case before the National Railroad Adjustment Board. The Court noted that the claim of racial discrimination was against both the Union and the railroad and, since the Board is in large part chosen by both parties, the plaintiffs in *Glover* should not be required to go to the Board.

In the instant case racial discrimination is not involved nor is there any claim of discrimination by the railroad. The procedures to the National Railroad Adjustment Board have always been open to the plaintiffs. They claim rights under an agreement. All their attorney had to do was file a proceeding before the Board and progress the case.

Our case is much closer to *Slagley v. Illinois Central Railroad Company*, 397 F. 2d 546 (7th Cir. 1968). The plaintiff, a railroad conductor, sued his employer railroad and his unions for compensatory and punitive damages claiming they violated a cooperative agreement relative to his seniority and that their actions were arbitrary, capricious and discriminatory. The District Court dismissed upon the ground that the National Railroad Adjustment Board had exclusive jurisdiction of plaintiff's claims. In the Seventh Circuit the appellant attempted to come under the *Vaca* exception to the general exhaustion requirement.

The Court noted that the *Railway Labor Act* reserves to an aggrieved railroad employee the right to participate at all stages of the adjustment process; that the appellant did not file his claim with the Adjustment Board, and affirmed the order of the District Court on the ground that the Adjustment Board had exclusive jurisdiction.

Any claim against the respondent Erie Lackawanna which plaintiffs have is under an agreement. The statute mandates exclusive jurisdiction in the Adjustment Board. The respondent has the right to have it determined in this tribunal, not in the District Court which has no jurisdiction.

Conclusion

The dismissal of plaintiffs' complaint as against respondent Erie Lackawanna should be sustained. The District Court's decision and order dismissing as against all defendants should be reinstated.

Dated: Buffalo, New York, December 19, 1969.

Respectfully submitted,

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